SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.724

TROY-PARISIAN, INC.,

Petitioner.

vs.

THE UNITED STATES OF AMERICA, ON RELATION AND FOR THE BENEFIT OF THE ADMINISTRATOR OF THE FEDERAL HOUSING ADMINISTRATION.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the United States District Court for the District of Idaho, Southern Division, dated the 29th day of September, 1939, is not reported, and appears on pages 22 to 44 inclusive of the record herein.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, dated October 30, 1940, has not yet been reported, and appears in the record herein at pages 162 to 166 herein.

II.

Jurisdiction.

(1) The date of the decree to be reviewed is October 30, 1940.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Sec. 240 (a), 28 U. S. C. A., 347, and rule 38 of the United States Supreme Court.

(3) This action was instituted in the United States District Court for the District of Idaho by the United States on relation and for the benefit of the Administrator of the Federal Housing Administration, to recover upon a certain conditional sales contract and installment note, both of which were executed at the same time and embraced in the same instrument. The conditional sales contract provided, among other things, for the purchase, sale, and installation of an automatic stoker, a water cooler, a forced air evaporator, and a refrigerating compressor. On May 11, 1936, for value, Detweiler Bros., payee, endorsed the contract and note to the Twin Falls Bank and Trust Company, of Twin Falls, Idaho, which was an insured institution pursuant to Title I, Section 2 of the National Housing Act, 48 Stat. 1246, 12 U. S. C. 1703, and upon the assignment the note and contract became insured against loss by reason of non-payment. Petitioner, Troy-Parisian, Inc., defended said action upon the ground of total failure of consideration and also breach of implied warranty of fitness as to the stoker. The other articles purchased under the conditional sales contract were paid for by Troy-Parisian, Inc.

The case was tried by the trial court without a jury, and resulted in a judgment for defendant, the petitioner

herein, Troy-Parisian, Inc. From this judgment the United States appealed and on the 30th day of October, 1940, the Circuit Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court for the District of Idaho.

The conditional sales contract in question contained the following provision:

> "Article 5. Seller may assign this contract to Twin Falls Bank & Trust Company without notice to Purchaser and when assigned shall be free from any defense, counterclaim, or cross-complaint by Purchaser".

In considering the above provision of the conditional sales contract the Circuit Court of Appeals for the Ninth Circuit held:

> "It will be necessary to consider the second only of these propositions. Art. 5 of the contract provided that "Seller may assign this contract to Twin Falls Bank & Trust Co. without notice to purchaser, and when assigned shall be free from any defense, counterclaim or cross-complaint by purchaser." We think it must be held that this proviso is a bar to the defense interposed.
>
> "Since the parties might originally have put their contract in negotiable form, there would appear to be no good reason why they may not by agreement impart to it limited elements of negotiability. Buyer and seller stood on equal footing and it is evident that this clause was deliberately inserted as a means of facilitating the financing of the sale through the named local bank. Unless in circumstances affronting public policy, it is no part of the business of the courts to decline to give effect to contracts which the parties have fairly and deliberately made.
>
> "By Sec. 62-601 of the Idaho Code it is provided that 'Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement

> * * *' Thus, as between themselves, the parties to a sale are free to negative warranties implied in law, and so validly to eliminate as grounds of defense all warranties save those expressed in the contract. So far, then, as it need be applied here, the provision in question can not fairly be said to run counter to the declared policy of the state.
>
> "Another local statute, Sec. 5-302 Idaho Code 1932, provides that 'In case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment.' In Pacific Acceptance Corporation *v.* Whelan, 43 Idaho 15, 248 P. 444, the Idaho court called attention to this statute in holding that a clause of the sort involved here did not preclude the defense of fraud or total want of consideration. The court approved the rule to that effect announced in American National Bank *v.* Sommerville Inc., 191 Cal. 346, 216 Pac. 376, and distinguished Anglo-California Trust Co. *v.* Hall, 61 Utah 223, 211 Pac. 991, as a case involving, not fraud, but breach of warranty. Consult further as supporting the validity of a similar provision, Elzey *v.* Ajax Heating Co., 10 N. J. Misc., 281, 158 A. 851. Contra: San Francisco Securities Corporation *v.* Phoenix Motor Co., 25 Ariz. 531, 220 Pac. 229."

The language of the decision of the Circuit Court of Appeals for the Ninth Circuit clearly indicated that the determination of that court was based entirely upon the theory that the only defense urged by petitioner herein was that of a breach of implied warranty. However, the record herein discloses that independent of the defense of breach of implied warranty there was alleged in petitioner's answer the defense of failure of consideration. Paragraph III of petitioner's affirmative defense contained in its answer, among other things, alleges as follows:

> "And that as a result of their failure so to do said stoker from the time of its installation to the time of

its removal by said Detweiler Bros., Inc., was of no value to defendant company and that said stoker was not of the value of $1,696.00, the purchase price set forth in said contract, or of any value whatsoever, and that there was an entire failure of consideration therefor".

Further, Paragraph IV of petitioner's affirmative defense contained in its answer, alleges in part as follows:

> "That by reason of the failure of consideration alleged and set forth in the preceding paragraph hereof, the defendant is not indebted to plaintiff on account of the contract and installment note set forth in Paragraph IV of plaintiff's complaint, insofar as the same pertains to said Model No. PS6 automatic stoker * * *", etc.

Upon the issue of failure of consideration an examination of the findings of the trial court discloses that this defense was determined by said court upon the facts in favor of petitioner herein, Finding of Fact No. 19, which, insofar as applicable, is as follows:

> "* * * and that by reason of said automatic stoker failing to perform the services for the particular purpose for which it was being purchased by defendant corporation, to-wit, for use in connection with the operation of a Scottish Marine boiler, in connection with the operation of a modern laundry, and by reason of said automatic stoker not being reasonably fit for such purpose that there was a failure of consideration on account of said conditional sales contract and installment note insofar as the same pertained to said Model No. PS6 automatic stoker * * *", etc.

and in its Conclusions of Law, and particularly Conclusion No. 5, upon this defense the trial court held:

> "* * * there was a total failure of consideration on account of said conditional sales contract and install-

> ment note insofar as the same pertained to said Model PS6 automatic stoker manufactured by the Iron Fireman Manufacturing Company, and that by reason of said failure of consideration defendant corporation is not indebted, obligated, nor under any liability whatsoever to plaintiff herein on account of said conditional sales contract and installment note covering the purchase price of said stoker."

The ruling of the Circuit Court of Appeals for the Ninth Circuit to the effect that since the parties might originally have put their contract in negotiable form is no good reason why they may not by agreement impart to it limited elements of negotiability, and by so doing bar the defenses of total failure of consideration and breach of implied warranty as against an assignee of such conditional sales contract, is a decision of an important question of local law in a way probably untenable or in conflict with the weight of local authority, and in conflict with the statutes of the State of Idaho and the decisions of the Supreme Court of the State of Idaho.

Section 5-302 Idaho Code Annotated, 1932, provides as follows:

> "In case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable instrument, transferred in good faith and upon good consideration, before maturity."

Section 28-110, Idaho Code Annotated, 1932, provided as follows:

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

The Supreme Court of the State of Idaho, in the case of *Pacific Acceptance Corporation* v. *Whelan,* 43 Idaho 15, 248 Pac. 444, held:

> "To sustain the instruction respondent relies on American Nat. Bank *v.* A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376. The California court, in the latter decision, construed a provision of a conditional sale contract, which is absolutely the same as the one quoted above. In a well-reasoned opinion, the court held that the purchaser in such a contract was not precluded from defending on the ground of fraud or want or failure of consideration. We are impressed with the soundness of the views of the California court.
>
> "(1) The contract is a non-negotiable instrument, and was, in the hands of the assignee, subject to all the equities and defenses existing in favor of the maker at the time of the assignment. C. S., sec. 6063. (2) Respondent was not precluded by the quoted provision from defending against the contract for fraud or a want or failure of consideration."

C. S. Section 6063 is now Section 5-302 Idaho Code Annotated, 1932, which is above set forth. The contract provision construed by the Idaho Supreme Court in the case of *Pacific Acceptance Corporation* v. *Whelan, supra,* is as follows:

> "It is agreed that in the event the seller shall assign and transfer this agreement, and his rights and the moneys payable thereunder, to a third party, then the purchaser shall be precluded from in any manner attacking the validity of this agreement on the ground of fraud, duress, mistake, want of consideration or failure of consideration, or upon any other ground, and all moneys payable hereunder by the purchaser shall be paid to such assignee or holder without recoupment, set-off or counterclaim of any sort whatsoever."

In construing Section 28-110 Idaho Code Annotated, 1932, the Supreme Court of Idaho in the case of *Harding* v.

Mutual Benefit Health and Accident Ass'n, 55 Ida. 131, 39 P. (2d) 306, held:

> "Section 28-110, supra, has been twice held valid. (Douville *v.* Pacific Coast Casualty Co., 25 Ida. 396, 138 Pac. 506, Ann. Cas. 1917A, 112; Gaffney *v.* Royal Neighbors of America, 31 Ida. 549, 174 Pac. 1014.)
>
> "Similar statutes have been upheld in other states." (Citing authorities.)

In the case of *Douville* v. *Pacific Coast Casualty Co.*, 25 Ida. 396, 138 Pac. 506, the Idaho Supreme Court held:

> "It is provided by subd. N of the contract of insurance that no action at law or in equity shall be commenced before three months nor after six months from the date on which this paragraph provides that affirmative proof must be furnished to the company. This is a clear violation of sec. 3321, Rev. Codes, which provides that every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time in which he may enforce his rights, is void. It would seem under the provisions of that section that the plaintiff was not bound by the limitations in said contract."

To same purport is the case of *Gaffney* v. *Royal Neighbors of America*, 31 Idaho 549, 174 Pac. 1014.

In the case of *General Motors Acceptance Corporation* v. *Talbott*, 38 Idaho 13, 219 Pac. 1058, the Supreme Court of Idaho, in construing the following provisions in a promissory note:

> "and I hereby agree to waive all benefits of valuation, appraisement and exemption laws, and all rights of appeal, and to release all errors",

held as follows:

> "C. S. Sec. 5670 is as follows:
>
> 'Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing

his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.'

"The stipulation in the contract in question comes within the inhibition of this section, is against public policy and is therefore void. The effect of such a stipulation is to oust the courts of their jurisdiction and to restrict the parties from enforcing their rights under the contract by the usual legal proceedings in the ordinary legal tribunals. There is some conflict of authority upon this subject in the reported cases but we do not think, in view of the foregoing statute, that the question is open to discussion in this state. In fact, we are of the opinion that this court has held that appellant's right of appeal cannot thus be foreclosed."

The decision of the Circuit Court of Appeals for the Ninth Circuit in construing Article 5 of the conditional sales contract is in further conflict with the general weight of authority. The general rule in this connection is well stated in the case of *Progressive Finance & Realty Co.* v. *Stempel*, (Mo. App.) 95 S. W. (2d) 834:

"The chief reliance of the plaintiff is put upon the following provision of the contract of sale: 'I admit notice of the intended assignment of this contract and note and agree that if this contract and note be assigned all payments shall be made to assignee absolutely, hereby waiving all rights now or hereafter existing in my favor against you to make any defense, counterclaim or cross-complaint to any demand or action brought by assignee to recover payments due under this contract and note or to recover possession of said chattels, I further agreeing that all claims or demands on my part against you shall be independent of any action by assignee against me.'

"This provision is obviously void as against public policy, in that it is designed to settle in advance the substantive rights of the parties under the contract and oust the courts of their jurisdiction to determine

such rights. It is settled law that parties cannot by contract oust the courts of their jurisdiction. After a right has accrued, or an obligation has been incurred, a party may waive his rights or refuse and neglect to enforce them, but it is not permissible for him to stipulate in advance that in the event of differences arising in the future he will deny himself the right to resort to the courts for their settlement. The state has an interest in all of its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided. For that reason its courts are always open for the redress of wrongs, and no person can by contract deprive himself in advance of the right to resort to them. Brucker *v.* Georgia Casualty Co., 326 Mo. 856, 32 S. W. (2d) 1088; Goerss *v.* Indemnity Co. of America (Mo. App.), 3 S. W. (2d) 272, loc. cit. 276; San Francisco Securities Corp. *v.* Phoenix Motor Co., 25 Ariz. 531, 220 P. 229."

The decision of the Circuit Court of Appeals for the Ninth Circuit to the effect that by express agreement a non-negotiable instrument, to-wit, a conditional sales contract, can be given the effect of a negotiable instrument by barring as against an assignee the defenses of want or failure of consideration and breach of implied warranty, is of major importance to the people of Idaho, in that it changes and alters the law of said State. This decision means that every maker of a conditional sales contract within the State of Idaho, executed prior to this decision, is now barred from asserting these defenses where the conditional sales contract contains a similar provision and which, under the laws of the State of Idaho existing at the time of the execution of said conditional sales contract, did not contain such a restriction. By such a provision inserted in a non-negotiable instrument it gives to such an instrument the effect of a negotiable instrument. Conditional sales contracts are widely and commonly used, and the importance of this

decision is such, we believe, that it should be settled by the United States Supreme Court.

III.

Statement of the Case.

This has already been stated in the preceding petition, under I (pp. 1-3), which is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

(1) That the Circuit Court of Appeals for the Ninth Circuit erred in holding that parties to a non-negotiable conditional sales contract could by express agreement impart to it limited elements of negotiability, in that such an express provision in a conditional sales contract would be void for the reason that such a provision is against public policy, and is designed to settle in advance the substantive rights of parties under the contract and oust the courts of their jurisdiction to determine such rights.

(2) That the Circuit Court of Appeals for the Ninth Circuit erred in failing to take cognizance of the defense of failure or want of consideration alleged in petitioner's affirmative defense contained in petitioner's answer and the findings and determination of the trial court upon said issue.

(3) That the Circuit Court of Appeals for the Ninth Circuit erred in failing to construe Article 5 of the conditional sales contract in question in connection with Section 5-302, Idaho Code Annotated, 1932, and Section 28-110, Idaho Code Annotated, 1932, in that a construction of said statutory provisions together and in conjunction with each other makes void Article 5 of the conditional sales contract in

question, insofar as said provision bars petitioner herein from asserting the defense of want or failure of consideration and breach of implied warranty of fitness, and deprives petitioner from enforcing its rights under the contract in question by the usual proceedings in the ordinary tribunals.

(4) That the Circuit Court of Appeals for the Ninth Circuit erred in giving effect to Article 5 of the contract in question, in that such provision of said contract is in conflict with the general rule of law that such provision in a contract is void as against public policy in that it is designed to settle in advance the substantive rights of parties under the contract and oust the courts of their jurisdiction to determine such rights.

V.

ARGUMENT.

Summary of the Argument.

Point A. A non-negotiable sales contract including therein a negotiable promissory note as a part thereof will be construed together as one agreement, and that as such is a non-negotiable instrument.

General Motors Acceptance Corporation v. *Garrard,* 41 Idaho 151, 238 P. 528;

Security Finance Company v. *Jensen Auto Co.,* 48 Idaho 376, 282 P. 88.

Point B. The Idaho Supreme Court has consistently held conditional sales contracts to be non-negotiable instruments.

General Motors Acceptance Corporation v. *Garrard,* 41 Idaho 151, 238 P. 528;

Security Finance Company v. *Jensen Auto Co.,* 48 Idaho 376, 282 P. 88;

First Nat'l Bank of Logan, Utah, v. *Eames,* 55 Idaho 628, 45 P. (2d) 795;

Kimpton v. *Studebaker Bros. Co.*, 14 Idaho 552, 94 P. 1039;
Moyer v. *Hyde*, 35 Idaho 161, 204 P. 1068;
Wright v. *Horton*, 32 Idaho 516, 185 P. 555;
Pacific Acceptance Corporation v. *Whelan*, 43 Idaho 15, 248 P. 444.

Point C. Under the laws of the State of Idaho, in case of an assignment of a non-negotiable instrument, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment.

Sec. 5-302, Idaho Code Annotated, 1932.

Point D. An express provision in a non-negotiable instrument expressly providing that seller may assign the contract without notice to purchaser and when assigned shall be free from any defense, counterclaim, or cross-complaint by purchaser, is void under the laws of the State of Idaho, in that such a contractual provision deprives one from enforcing his rights by the usual proceedings in the ordinary tribunals.

Sec. 5-302, Idaho Code Annotated, 1932;
Sec. 28-110, Idaho Code Annotated, 1932;
Pacific Acceptance Corporation v. *Whelan*, 43 Idaho 15, 248 P. 444;
General Motors Acceptance Corporation v. *Talbott*, 38 Idaho 13, 219 P. 1058;
Douville v. *Pacific Coast Casualty Co.*, 25 Idaho 396, 138 P. 503;
Gaffney v. *Royal Neighbors of America*, 31 Idaho 549, 174 P. 1014;
Harding v. *Mutual Benefit Health & Accident Ass'n*, 55 Idaho 131, 39 P. (2d) 306.

Point E. A provision in a non-negotiable instrument expressly providing that seller may assign the contract with-

out notice to purchaser and when assigned shall be free from any defense, counterclaim or cross-complaint by purchaser, is void as against public policy, in that it is designed to settle in advance the substantive rights of parties under the contract and oust the courts of their jurisdiction to determine such rights.

Progressive Finance & Realty Co., Inc. v. *Stempel,* (Mo. App.), 95 S. W. (2d) 834;

San Francisco Securities Corporation v. *Phoenix Motor Co., Inc.* (Ariz.), 220 P. 229;

Steinhardt v. *Consolidated Grocery Co.* (Fla.), 86 So. 431;

General Motors Acceptance Corporation v. *Talbott,* 38 Idaho 13, 219 P. 1058;

Mills v. *Maxwell Motor Sales Corporation* (Neb.), 181 N. W. 152, 22 A. L. R. 130;

Price v. *Advance Rumely Thresher Co.* (Tex. C. A.) 264 S. W. 113;

Mannix v. *Superior Court* (Cal. App.), 24 P. (2d) 507;

Frick-Reed Supply Corporation v. *Meers* (Tex. C. A.), 52 S. W. (2d) 115;

Douville v. *Pacific Coast Casualty Co.,* 25 Idaho 396, 138 P. 506;

Gaffney v. *Royal Neighbors of America,* 31 Idaho 549, 174 P. 1014;

Harding v. *Mutual Benefit Health and Accident Ass'n,* 55 Idaho 131, 39 P. (2d) 306.

Point F. The United States as an assignee of a non-negotiable instrument is subject to the same rules of law as apply to individuals and private corporations.

Point G. Where a piece of equipment is worthless for the purpose for which it is purchased there is a failure of consideration constituting a defense to an action on a conditional sales contract and promissory note given for the

purchase price, even though such action is prosecuted by the assignee.

Stevens v. *Gaude* (La.), 120 So. 79;
Stevens v. *Sonnier* (La.), 122 So. 894;
McCaskey Register Co. v. *McCurry* (Ark.), 26 S. W. (2d) 1108;
Doylestown Agriculture Co. v. *Ewing* (Dela.), 79 Atl. 212;
55 *Corpus Juris, Sales*, Secs. 36, 37, p. 73; Sec. 38, p. 74; Sec. 237, p. 263; Sec. 963, p. 961;
Utley v. *Stevens* (Ala.), 130 So. 405;
Model Plan Finance Corp. v. *Kelley* (N. J.), 153 Atl. 488;
DeBaun v. *Weaver* (Ky.), 228 S. W. 27;
Buss v. *Allison Window Glass Co.* (Mo.), 123 S. W. 948;
Holland Furnace Co. v. *Gabriel* (Pa.), 157 Atl. 373;
Hot-N-Kold Corporation v. *Todd* (Cal.), 288 P. 687;
Adams v. *Hughes* (Mo.), 235 S. W. 168;
Southern Engine & Pump Co. v. *Tennessee L. & P. Co.* (Tex.), 196 S. W. 260;
Mahoney v. *Standard Gas Engine Co.* (Cal.), 202 P. 146;
Elmer Bros. v. *Carpenter* (Cal.), 183 P. 566;
DeBarkesy v. *Strain* (Cal.), 215 Pac. 105;
Holland Furnace Co. v. *Manning* (Ga.), 163 S. E. 259;
Pidcock v. *J. Crouch & Sons* (Ga.), 66 S. E. 971;
Hallwood Cash Register v. *Berry* (Tex.), 80 S. W. 857;
P. B. Yates Machine Co. v. *Grace* (Tex.), 281 S. W. 226;
Moorman v. *Wilson* (Ill.), 209 Ill. App. 104;
True v. *Deeds & Son* (Tenn.), 271 S. W. 41;
Morton Electric Co. v. *Schram* (Mo.) 277 S. W. 368.

Point H. Where a piece of machinery is purchased for a particular purpose and the buyer relies on the seller's

skill or judgment there is an implied warranty that such machinery shall be reasonably fit for the purpose for which it is purchased.

Barnett v. *Hagan*, 18 Idaho 104, 108 P. 743;
Grisinger v. *Hubbard*, 21 Idaho 469, 122 P. 853; Ann. Cas. 1913E, 87;
Tometa v. *Johnson*, 49 Idaho 643, 290 P. 395;
Hurd-Pohlmann Co. v. *Sugita*, 32 Hawaii 577;
Luria Bros. & Co. v. *Klaff* (Md)., 115 Atl. 849;
Ward v. *Walker* (N. D.), 176 N. W. 129;
Minneapolis Steel & Mach. Co. v. *Casey* (N. D.), 201 N. W. 172;
Wright v. *General Carbonic Co.* (Pa.), 114 Atl. 517;
Farr v. *Zeno* (Pa.), 81 Pa. Sup. Ct. 509;
Hansken v. *Hodson-Feenaughty Co.* (Wn.), 186 P. 319;
Oil Well Supply Co. v. *Watson* (Ind.), 80 N. E. 157;
Colberg v. *Central Fruit & Grocery Co.* (Ohio), 174 N. E. 144;
Crow v. *Fones Bros. Hardware Co.* (Ark.), 4 S. W. (2d) 904;
S. H. Kress & Co. v. *Ferguson* (Tex.), 60 S. W. (2d) 817; Sec. 62-115 Idaho Code Annotated, 1932;
Burkett v. *Oilomatic Heating Corp.* (Mich.), 217 N. W. 897;
Chicago Steel Foundry Co. v. *Crowell* (Okla.), 14 P. (2d) 1105;
Davenport Ladder Co. v. *Hines Lbr. Co.* (C. C. A., Ia.), 43 F. (2d) 63.

Point I. Where several pieces of equipment are purchased and the contract is divisible as to each piece of equipment, there can be a failure of consideration for one specific piece of property.

DaPonte v. *Somonian* (Wn.), 220 P. 799;
Bates v. *Lilly Brokerage Co.* (La.), 159 So. 457;

Advance Rumely Threshing Machine Co. v. *Terpening*, (Mont.), 193 P. 752;
Acme Harvesting Mach. Co. v. *Gasperson* (Mo.), 153 S. W. 1069;
J. B. Colt Co. v. *Preslar* (Mo.), 274 S. W. 1100;
Elmer Bros. v. *Carpenter* (Cal.), 183 P. 566;
Adams v. *Hughes* (Mo.), 235 S. W. 169;
Holland Furnace Co. v. *Manning* (Ga.), 163 S. E. 259;
Ohio Thresher & Engine Co. v. *Hensel* (Ind.), 36 N. E. 716;
Hot-N-Kold v. *Todd* (Cal.), 288 P. 687.

Point A.

In every case coming before the Supreme Court of the State of Idaho involving a conditional sales contract the Court has consistently held that a conditional sales contract is non-negotiable, and the decision of the Circuit Court of Appeals for the Ninth Circuit in this case is upon the theory that the conditional sales contract was a non-negotiable instrument, but that by reason of the provisions of Article 5 of said contract limited elements of a negotiable instrument were imparted to it.

Point B.

An examination of the conditional sales contract in question discloses that there was attached to the conditional sales contract an installment note, both instruments bearing the same date. Under such circumstances the conditional sales contract and installment note must be construed as one instrument in determining its negotiability, and by reason thereof both the conditional sales contract and the installment note are non-negotiable instruments.

Point C.

The conditional sales contract in question being a non-negotiable instrument is governed by the provisions of Sec-

tion 5-302 Idaho Code Annotated, 1932, which provides as follows:

> "In case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable instrument, transferred in good faith and upon good consideration, before maturity."

Point D.

However, the Circuit Court of Appeals for the Ninth Circuit held that by reason of the provisions of Article 5 of the conditional sales contract in question, which is as follows, to-wit:

> "Article 5. Seller may assign this contract to Twin Falls Bank & Trust Company without notice to Purchaser and when assigned shall be free from any defense, counterclaim, or cross-complaint by Purchaser",

this provision of the contract imparts to it limited elements of negotiability and that by reason of this express provision the defenses urged by petitioner of want or failure of consideration and breach of implied warranty are barred. In reaching this conclusion the Circuit Court of Appeals for the Ninth Circuit in its decision failed to take into consideration the provisions of Section 28-110 Idaho Code Annotated, 1932, which provides as follows:

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void".

The Idaho Supreme Court in the case of *Pacific Acceptance Corporation* v. *Whelan,* 43 Idaho 15, 248 P. 444, expressly held that a similar provision in a conditional sales

contract was void, and that even though such a non-negotiable instrument contained such a provision it was "subject to all the equities and defenses existing in favor of the maker at the time of the assignment", and that the purchaser in such a contract "was not precluded from defending on the ground of fraud or want or failure of consideration". The affirmative defense of petitioner alleged a failure of consideration, and this allegation of the affirmative defense was sustained by the trial court in its findings of fact and conclusions of law.

Point E.

Not only is Article 5 of the conditional sales contract in question void by reason of the provisions of Section 28-110 Idaho Code Annotated, 1932, in that such a contractual provision restricts the purchaser from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, but such a contractual provision is void as against public policy under the predominating weight of authority. A well considered case which is squarely in point is the case of *Progressive Finance & Realty Co., Inc.*, v. *Stempel* (Mo. App.), 95 S. W. (2d) 834. This is a case involving a conditional sales contract with a similar provision where the defense of breach of implied warranty was invoked. The Missouri court held:

> "This provision is obviously void as against public policy, in that it is designed to settle in advance the substantive rights of the parties under the contract and oust the courts of their jurisdiction to determine such rights. It is settled law that parties cannot by contract oust the courts of their jurisdiction. After a right has accrued, or an obligation has been incurred, a party may waive his rights or refuse and neglect to enforce them, but it is not permissible for him to stipulate in advance that in the event of differences arising in the

> future he will deny himself the right to resort to the courts for their settlement".

The large number of cases previously cited under this point clearly indicates that the Missouri case is in accord with the great weight of authority.

Point F.

The rule set forth above is so fundamental and elementary that we do not believe it is necessary to discuss it.

Point G.

The conditional sales contract in question enumerates each piece of equipment purchased by petitioner and the purchase price thereof, including the sales tax thereon. There is no question raised as to the articles of equipment purchased other than the stoker being unsatisfactory. The trial court found that as to the stoker there was a total failure of consideration. The great weight of authority is to the effect that where a piece of equipment is worthless for the purpose for which it is purchased there is a failure of consideration constituting a defense to an action on the sales contract or promissory note given for the purchase price. This rule of law is sustained by the numerous authorities cited under this point.

Point H.

In addition to the defense of failure of consideration the petitioner alleges and the trial court sustained the defense of breach of implied warranty. Section 62-115 Idaho Code Annotated, 1932, provides in part as follows:

> "Subject to the provisions of this law and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular

purpose of goods supplied under a contract to sell or a sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose * * *."

The record disclosed that Detweiler Bros. Inc., explained in detail to petitioner the manner of operation of an overfeed stoker, its efficiency and suitability for operation in petitioner's laundry plant (R. 6, 110). The trial court held that the stoker in question having, as pointed out, been sold to petitioner for a specific purpose, an implied warranty existed that the article of equipment sold was of the kind and quality ordered and fit and suitable for the purpose for which it was ordered. The finding of the trial court in this connection was in accord with the great weight of authority, as shown by the authorities cited under this point.

Point I.

The fact several pieces of equipment were purchased under the same conditional sales contract is immaterial, in that under this particular conditional sales agreement it was divisible as to each piece of equipment; that is to say, the purchase price and sales tax on each piece of equipment was set forth in the agreement. Petitioner paid the purchase price of all pieces of equipment except the automatic stoker. It is well settled where a conditional sales contract is divisible as to each piece of equipment that there can be a failure of consideration for one specific piece of property.

We therefore respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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